IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.1182 OF 2005

Vilasrao Shripati Yadav & Anr. ...Appellants

Vs.

Alaknanda Murlidhar Lahoti & Anr. ...Respondents

Mr.V.D.Patil for the Appellants
Mr.R.S.Kate for the Respondent No.1.
Mr.V.P.Sawant for Respondent No.2

CORAM: A.S.OKA, J.
DATED: JULY 27,2006.

P.C.:

1. Heard Advocate for the Appellants. The Appellants are the original Plaintiffs. The Appellants filed a suit for declaration that the decree obtained by the first Respondent in R.C.S.No.251 of 1986 is illegal as the same is obtained by practising fraud and consequently, the execution of the sale deed is illegal.

2. The Trial Court decreed the suit in favour of the Appellants. The Appellate Court has interfered with the decree. The Appellate Court has held that the suit filed by the Appellants was barred by limitation and the Appellants have failed to prove that the decree was obtained by fraud.

3. Shri Patil for the Appellants submitted that the finding on the issue of limitation is completely erroneous as section 14 of the Limitation Act,1963 will apply. He invited my attention to the order passed by this Court in earlier Writ Petition filed by the Appellants.

4. He submitted that the address of the Appellants mentioned in the cause title of R.C.S.No.251 of 1986 was totally wrong. He submitted that this was a deliberate act on the part of the first Respondent only for the purposes of obtaining an ex parte decree. He pointed out the first Respondent is involved in the similar litigations which is a matter of record. He placed reliance on a decision of the learned Single Judge of this Court in case of Radhelal Jagannath Biitholia Vs State of Maharastra.

5. I have considered the submissions. In the plaint the Appellants have specifically asserted that though the Appellants were residing at village Harphalwadi, Taluka Karad, the first Respondent has deliberately mentioned in the plaint of the R.C.S.No.251 of 1986 that the Appellants were residing at Harphalwadi, Atit. It is contended that thus the fraud is played by the first Respondent by mentioning incorrect address of the Appellants in the plaint and by practising fraud, the order was obtained from the Trial Court to proceed with the suit ex parte. My attention has been invited to the deposition of the first Appellant in the present suit. In the said deposition, he has not at all stated that when R.C.S.No.251 of 1986 was filed, he was not residing at the address mentioned in the cause title of said suit. He has also not deposed as to what was his correct address at the relevant time. He has merely made a statement that he was not served with the notice of the suit. The entire foundation of the plea of fraud as pleaded by the Appellants was that the address which was mentioned in the

cause title of the suit filed by the Respondent was totally incorrect and on the relevant date the Appellants were residing elsewhere. Though existence fraud is pleaded by the Appellants, the burden to establish the same on evidence was on them. However, the Appellant No.1 has not even stated that his address mentioned in the cause title of the suit filed by the first Respondent was incorrect.

6. The Appellate Court observed that prior to institution of the suit, the first Respondent had issued legal notice to the Appellant No.1 and the said notice was duly received by the Appellant No.1 which was not replied by him. In paragraph 25 of the Judgment, the Appellate Court has recorded a finding that in R.C.S.No.251 of 1986 filed by the first Respondent, summons was sent to the first Appellant by R.P.A.D. which was returned with the endorsement that the first Appellant has refused to accept the said summons.

7. It is pertinent to note that the Appellants were admittedly served with the notice of the execution application filed by the first Respondent in the year 1989. The present suit was filed by them in the year 1994. In paragraph 27 of its Judgment, the Appellate Court has noted that on 31st August 1989 the first Appellant filed a reply in the execution proceeding for contesting the execution proceeding. The Appellate Court noted that in the said reply no plea was raised by the Appellants as regards fraud or misrepresentation by the first Respondent. In view of this factual position, it is difficult to find fault with the

finding of fact recorded by the Appellate Court that the Appellants did not establish the fraud. Involvement of the first Respondent in similar cases is not sufficient to prove the fraud. The fraud should have been established by the Appellants by leading cogent evidence. Reliance placed by the learned Advocate for the Appellants on the decision in case of Radhelal Jagannath Bitholia Vs.State of Maharashtra (supra) will not help him. The specific plea in the suit filed by them is that the fraud is practised by the first Respondent. The plea of fraud is not established. Thus, no fault can be found with the impugned Judgment.

7. Though there is substance in the submission made by the learned Advocate for the Appellants on the issue of limitation, no purpose will be served by entertaining the Second Appeal as the Appellants have failed to establish the plea of fraud. No substantial question of law arises. Second Appeal is dismissed with no order as to costs.

8. At this stage, the learned Counsel for the Respondent No.2 submitted that the observations made in the Judgment should not affect the rights of the Respondent No.2 as the Respondent No.2 is claiming to be in possession of the property in dispute. The only issue which is decided in this Appeal is whether the Appellants have failed to establish their plea of fraud. Hence, it is not necessary to issue any such clarification.

Judge.